

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JAMES DOVENBERG,

No. CV 08-889-MO

Plaintiff,

OPINION AND ORDER

v.

UNITED STATES OF AMERICA, by and through
the UNITED STATES FOREST SERVICE;
and STATE OF OREGON, by and through the
OREGON DEPARTMENT OF FORESTRY,

Defendants.

MOSMAN, J.,

Plaintiff James Dovenberg has sued the U.S. Forest Service and the State of Oregon and its Department of Forestry for damage to his property that allegedly occurred while agents of both defendants were fighting the Shaker Table Complex Fire in August of 2006. He alleges the property was damaged by the negligent actions of the agents, and by their failure to prevent fire damage. The State defendants have moved to dismiss because (1) the State of Oregon is not a proper defendant under the Federal Tort Claims Act; and (2) the State of Oregon has not waived its sovereign immunity from suit in federal court under the Eleventh Amendment.

Plaintiff does not contest that the State defendants are not proper defendants under the Federal Tort Claims Act. Instead, he appears to rely solely on a theory of general negligence. I therefore grant the motion to dismiss the State defendants as to the Federal Tort Claims Act claim.

Plaintiff has not articulated any specific argument for how the State of Oregon has waived its sovereign immunity from suit in federal court. For this reason alone, it is appropriate to grant the State defendants' motion to dismiss in total. In an abundance of caution, the State has raised and then knocked down two possible theories: the Oregon Tort Claims Act and 42 U.S.C. § 1856(a). Neither of these theories carries the day for plaintiff, and in any event they were never specifically articulated by plaintiff. While plaintiff suggests some theory may become viable after more discovery, something more than speculation and hope is required to overcome the Eleventh Amendment's ban -- a ban on being sued, after all, not on being taken all the way to trial.

The State defendants' Motion to Dismiss (#5) is GRANTED.

DATED this 22nd day of October, 2008.

/s/ Michael W. Mosman
MICHAEL W. MOSMAN
United States District Judge